No. 14328

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

BETTY GULLEY,
Appellant,

vs.

MARY JANE GULLEY, Also Known as MARY J. GULLEY, Now MARY JANE WAUSON, and UNITED STATES OF AMERICA, *Appellees.*

Upon Appeal from the District Court of the United States for the District of Nevada.

PETITION BY APPELLANT FOR REHEARING

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TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

BETTY GULLEY, the appellant above named, presents this, her petition for a rehearing in the above entitled cause, and in support thereof, respectfully shows:

I

The Court, in its majority opinion of affirmance filed herein on March 13, 1956, has clearly failed to follow the oft-expressed rule that each insurance case must be decided in the light of its own facts. (E.g., *Mitchell* v. *U. S.*, 5th Cir. 1948, 165 F2d 758, 2 ALR2d 484, and annotation following.)

II

The case of *Kendig* v. *Kendig*, 9th Cir. 1948, 170 F2d 750, differs so materially in its facts as not to be an authority for affirmance here. We find that the so-called "confidential statement" referred to in that case is not now available as a photostat copy of that report, the only copy used on the trial below, was withdrawn by counsel. A painstaking perusal of the 106 page Transcript of Record on appeal reveals the startling fact that this report was never before this Honorable Court. Hence the references thereto by Judge HEALEY in that case, and by Judge ORR in the majority opinion in this case, lose much of their forcefulness. We invite particular attention to the former case at page 751, where Judge Healey said:

> "*We understand it to be the practice* at the United States Naval Air Stations to have these confidential forms filled out by each officer upon his reporting for duty. The statement is then sealed and placed with the officer's record to be opened only in the event of the death or serious injury of the officer concerned." (Emphasis supplied.)

How and why did the Court so understand? Not from testimony in the Transcript of Record, for there is none.

Also to Judge Orr's language in the instant case, p. 3 of the advance opinion:

> "An *identical statement* was characterized in Kendig, supra, at page 251" (apparently a typographical error for 751) "as", etc. (quoting from that opinion). (Emphasis again supplied.)

Judge Healey had also referred to a confidential statement of the same type in the case of *Bradley* v. *United States*, 10 Cir. 143 F2d 753. The document in that case was a confidential personal report required of all flying officers, with the Army Air Force Circular establishing a file of such reports set out in full as a footnote to page 754.

It does appear from the Kendig Transcript of Record that the document there was identical in one respect with the confidential statement here. (Page 97) The plaintiff was invited to read certain language from a photostat copy as the remaining part of Sheet 1, beginning with the words "I hold the following insurance policies;"

> "Answer: The name of Company; Government; amount, $10,000; beneficiary, Wife: Location of Policy: *Phoenix, Arizona, with Mrs. Mary Kendig.*" (Emphasis supplied.)

Lt. Kendig thus clearly identified the policy referred to. Cf. the confidential statement here, where the decedent left that portion of an identical heading entirely blank. To us the dissenting opinion language that a confidential statement "in many cases may in fact actually be a statement made only for the reason that the marine has a present intention to change his beneficiary" seems peculiarly apt. He may even have

then had in mind taking out another policy in favor of his wife.

III

The case of *Aguilar* v. *United States*, 9th Cir. 1955, 226 F2nd 414, decided subsequent to the presentation of our appeal, likewise differed so materially in facts as not to be an authority for the affirmance here.

Aguilar was a member of the Air Force, a newly created separate branch. Rank or rating not shown, and as in the instant case, it does not appear that he was a flyer. Extracts from two letters in the opinion by Judge Orr do not indicate his "possessing the degree of literacy required of an officer" as Judge Lee said of the United States Air Corps in *Mitchell* v. *U. S.*, supra. His unsophistication is apparent, it seems to us, in that Aguilar asked his brother, also a veteran, what steps should be taken in order to effectuate a change of beneficiary in his insurance. Prudence should have directed an inquiry of his commanding officer or of the equivalent of a top sergeant in his group. Further differentiating, it seems quite likely that Aguilar's was what we have called a wrong form case, the execution of a paper dealing with gratuities or allotments, and no more. How else can his quoted second letter be explained?

> "You don't have to fill out any papers at all, cause I have straightened everything out. *You will start getting a check next month.*" (Emphasis supplied.)

However that may have been, Judge Orr said of these two letters:

> "No more competent evidence of an affirmative act having been taken could have been produced short of the production of a written instrument containing the change. The production of evidence of this dignity, the courts have said, is not required, *if other competent evidence convinces the trier of the facts that such an instrument at one time was executed.*" (Emphasis supplied.)

Nowhere in our case, we submit, is there a word indicating that Judge Foley was so convinced. He based his conclusions on other grounds. On the contrary, there was and is persuasive evidence in the record that no such instrument was in probability executed. Pltfs Exhibit 3 (Tr. 44) is a blank form for Change of Beneficiary, United States Government Life Insurance, and we invite attention to the printed instruction thereon:

> "This form, when completed, should be immediately forwarded WITH THE POLICY to the Veterans Administration for endorsement of change of beneficiary."

Although perhaps not strictly apparent of record, the policy was at all times in the possession of the beneficiary, the appellant here. She produced it on the trial (Tr. 41) and it was admitted in evidence, with permission to withdraw on substitution. Our contention is that even IF the decedent had executed such a form for change of beneficiary, witnessed as required, and had forwarded it, immediately or otherwise, unaccompanied by the policy, it would have been of none effect.

This Court would seem to have overlooked the point, previously argued by us, that the trial court in its Conclusion of Law No. 1 (Tr. 22) must have reasoned that by filing this confidential statement the decedent Wallace Phillip Gulley took affirmative action evidencing an exercise of his right to change beneficiary, and, inferentially, that the confidential statement was in itself such change. Counsel concurred in this in their brief and (page 6) went even beyond it in contending that oral statements alleged to have been made to the wife and to Baker established the affirmative acts required to effectuate the intent. On the oral argument counsel (Mr. Smith) was asked by a member of this Court if it were his contention that the filing of the confidential statement was in itself a change of beneficiary, and answered—albeit somewhat hesitantly—that it was. So far this Court has never so held, nor, as we have found, has any other of appellate jurisdiction.

In view of the fact that the trial judge based his decision on the confidential statement, seemingly disregarding the other evidence as evenly balanced—as Judge Chambers says, he believed everybody—may we invite attention to the fact that there was no reference to a confidential statement or report in the Aguilar case? Counsel in their brief contended that such confidential statements were "required by Government." True, the decedents in the two cases were in different branches of the service, but so were those in the Bradley and Kendig cases. In our view all that

the reported cases show is that confidential statements or reports of one kind or another are or were required of flying officers. For enlisted non-flying personnel they may well be and we believe are entirely voluntary. Should this case ever be remanded for a new trial we are in a position to offer evidence on that point.

V

The trial court and this Court seemingly gave undue weight to the testimony of Neil D. Baker, a deposition on written interrogatories, with no one present representing the plaintiff. The Court adopts the finding below that statements or a statement were made by the decedent to Baker in June, 1947, and by way of comment thereon, says that these or this were made "subsequent to the statement made to the sister, . . . being then removed from the family influence", etc. Would it not have been equally reasonable to have concluded that Baker's statement or statements might have been a fabrication? He may have been a disinterested witness, but on the other hand, he was acquainted with the defendant Mary Jane Gulley since toward the end of 1946, which would be shortly after her marriage to the decedent, had been named by her as the escort for the body of her late husband to Nevada, and had left Ely on the same bus with her the night after the funeral for the return to Southern California. It may be assumed that he told her, on that trip or later, (although he said in the deposition he had not seen her since) that he would do what he could to help her get the insurance,

but, curiously enough, nothing about the confidential statement. He was interviewed by counsel in June, 1948, and made an affidavit which was used on the hearing before the Veterans Administration at Sawtelle. After the one interview and possibly others, interrogatories were prepared for the deposition taking. The deposition shows that Baker seldom gave dates when asked for them. He volunteered (Int. 8) that a conversation took place in June, '47, fixing the time by reference to a furlough, and went on to say what the conversation was, although not then asked. This came up under Nos. 12 and 13, and he then told where but not when. Passing the questions about confidential statements, in which he was fed a date by No. 19, as it happens, the date on the confidential statement, we have insurance as a topic again, whether the same or another conversation, as he did not answer the question of when it was. A willing but not a definite witness, we should say.

The rule that the trial court has the opportunity of observing the demeanor of the witness, etc. does not apply here, as Baker was not before the court and there was nothing to judge him except cold typewriting, as there is nothing before this Court except cold print. The defendant Mrs. Wauson was present when the deposition was read, and thereafter testified personally. She fixed the date of a second conversation with her husband on the topic of insurance, rather indefinitely, as about two months prior to his death, which might mean in June, 1947. Both she and her counsel knew at all times after the hearing at Sawtelle that her ex-mother-in-law would rely upon

statements made by her son in the previous month, around Mother's Day of 1947. There was every opportunity for agreement upon a date subsequent thereto for testimony as to other statements diametrically opposed thereto.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment of the District Court of the United States for the District of Nevada be, upon further consideration, reversed and the cause either remanded for new trial, with appellant's costs herein, or judgment thereon rendered by this Court.

Respectfully submitted,

ROBERT RICHARD GILL
Ely, Nevada
Attorney for Petitioner and Plaintiff-Appellant

I, Robert Richard Gill, attorney for appellant, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for the purpose of delay.

Robert Richard Gill